

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA06-341

October 25, 2006

TONYA COTTON

APPELLANT

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT
[NO. J-2003-345]

V.

ARKANSAS DEPARTMENT OF
HEALTH and HUMAN SERVICES

APPELLEE

HON. KENNETH DAVID COKER,
JUDGE

AFFIRMED

This is a no-merit appeal from a decision of the Pope County Circuit Court terminating the parental rights of appellant Tonya Cotton as to her four minor children, G.E. (D/O/B: December 15, 2001), B.E. (D/O/B: January 17, 2000), A.E. (D/O/B: October 9, 1998), and B.M. (D/O/B: April 20, 1997). Her attorney has filed a motion to withdraw as counsel and a no-merit brief pursuant to *Linker-Flores v. Ark. Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004) and Ark. Sup. Ct. R. 4-3(j)(1). We affirm the trial court's termination of Cotton's parental rights and grant the motion to withdraw.

The Arkansas Department of Human Services (ADHS) removed the children from appellant's custody on December 17, 2003, after appellant's trailer home caught on fire while appellant was napping and the children were unsupervised and playing with cigarette

lighters.¹ On December 22, 2003, ADHS filed a petition for emergency custody alleging that the children were in substantial, serious danger of irreparable harm due to: the fire in the home; a lack of supervision; the fact that appellant was residing with the individual who had sexually abused B.E.; as well as additional environmental and medical neglect. The children were adjudicated dependent-neglected on February 17, 2004.

ADHS filed a petition for termination of appellant's parental rights on March 3, 2005, and the hearing on the petition was held on May 17, 2005, continued on May 20, 2005, and concluded on July 13, 2005, approximately nineteen months after the children were removed from appellant's custody. Appellant was not present at the beginning of the first day of the hearing, and despite a motion for a continuance from her attorney, the hearing proceeded. Appellant was present for the afternoon session of the first day of the hearing, and for the majority of the remainder of the hearing. Her parental rights with respect to all four children were terminated pursuant to an order filed on September 8, 2005. This no-merit appeal followed.

Pursuant to *Linker-Flores, supra*, and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, appointed counsel for an indigent parent, after a conscientious review of the record, may tender a motion to withdraw on the ground that an appeal is wholly without merit. The motion is to be accompanied by a brief purportedly

¹On or about December 8, 2003, appellant was contacted and interviewed by ADHS in response to a request ADHS received from the Arkansas State Police, Crimes Against Children Division to assist in a sexual abuse investigation regarding B.E.

presenting a thorough and professional evaluation of the record and discussing all matters in the record that might arguably support an appeal, including any adverse rulings, and a statement as to why counsel considers each point raised as incapable of supporting a meritorious appeal. The indigent parent must be provided with a copy of counsel's brief and notified of the right to file a list of points on appeal within thirty days; appellant filed no points in this matter.

If this court determines, after a full examination of the record, that the appeal is frivolous, the court may grant counsel's motion to withdraw and affirm the trial court's decision. *See Smith v. Ark. Dep't of Human Servs.*, 93 Ark. App. 395, ___ S.W.3d ___ (2005). Our review of adverse rulings in no-merit termination-of-parental-rights cases is limited to the termination hearing. *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. ___, ___ S.W.3d ___ (Nov. 17, 2005). However, in determining what constitutes a "conscientious review of the record" for purposes of reviewing the sufficiency of the evidence, our supreme court has provided that "we must examine evidence from all hearings and proceedings in the case, as the circuit court took judicial notice and incorporated by reference into the record all pleadings and testimony in the case that occurred before the termination-of-parental-rights hearing." *Id.* at ___, ___ S.W.3d at ___ (*citing* Ark. Code Ann. § 9-27-341(d)(2)).

As to the sufficiency of the evidence, an order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the children, taking into consideration the likelihood that the children will be adopted and the

potential harm caused by continuing contact with the parent. Ark. Code Ann. § 9-27-341(b)(3)(A). In addition to determining the best interests of the children, the court must find clear and convincing evidence that circumstances exist that, according to the statute, justify terminating parental rights. Ark. Code Ann. § 9-27-341(b)(3)(B). One such set of circumstances that may support the termination of parental rights is when the “juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.” Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a). In the instant case, the children had been out of appellant’s custody for approximately nineteen months as of the time of the termination hearing.

A heavy burden is placed upon the party seeking to terminate parental rights because this is an extreme remedy in derogation of the natural rights of the parents. *Jones v. Ark. Dep’t of Human Servs.*, 361 Ark. 164, ___ S.W.3d ___ (2005). Parental rights, however, will not be enforced to the detriment of the child; thus, parental rights must give way to the best interest of the child when the natural parent seriously fails to provide reasonable care for the minor child. *Id.*

From our review of the record and brief presented to us, we cannot say that the circuit court erred in entering an order terminating appellant’s parental rights. Appellant’s children were removed from her custody after they set the residence on fire while playing

unsupervised when appellant was taking a nap. Appellant missed one half of the first day of the termination hearing, and was late for the final day of the hearing. At the termination hearing, evidence was presented that appellant was unable to care for her four children, two of which had special medical and psychological issues. Evidence was presented that appellant failed to follow the case plan established with ADHS. Appellant failed to finish the required drug abuse treatment, tested positive for drugs on a regular basis, and even tested positive for amphetamines and methamphetamine on the final day of the termination hearing. She failed to complete individual counseling and did not attend the medical and psychological appointment for the children despite having been requested to do so. Appellant knowingly made the decision to marry the man who had sexually abused her daughter. There was extensive testimony related to appellant's impulsive behavior and inability to provide the needed stability for her children, including various relocations and job changes throughout the case.

Additionally, appellant did not argue that ADHS failed to provide her with the necessary services or make a meaningful effort to reunify her with the children. There was also evidence presented by ADHS as to the likelihood of the children being adopted, including testimony from the foster mother that they were interested in adopting all the children, as well as four hits for the four children on the adoption inquiry match in September 2004 and four hits in May 2005.

Aside from the sufficiency of the evidence supporting the termination of appellant's parental rights, the only adverse ruling from the termination hearing was the circuit court's denial of the motion for a continuance based on appellant's absence at the beginning of the termination hearing. This court recently dealt with similar circumstances in *Smith v. Ark. Dep't of Human Servs.*, *supra*, stating:

With regard to the adverse ruling which occurred at the termination hearing, a trial court shall grant a motion for continuance only upon a showing of good cause and only for so long as is necessary. *Green v. State*, 354 Ark. 210, 128 S.W.2d 563 (2003). The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Id.* When deciding whether a continuance should be granted, the trial court should consider the following factors (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness's attendance in the event of postponement; (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Id.* Additionally, the appellant must show prejudice from the denial of a motion for continuance. *Id.*

93 Ark. App. at ___, ___ S.W.3d at ___. This issue was found not to present a meritorious issue for appeal in the *Smith* case.

Here, appellant's counsel was present and represented her throughout the three-day termination hearing. Moreover, appellant was not prejudiced, as she was present for the afternoon session as well as the additional two days of the hearing. She was able to testify on her own behalf on the final day of the hearing. No good cause was shown for continuing the hearing, and we hold that the circuit court did not abuse its discretion by denying the motion.

We would note that appellant's counsel failed to discuss the denial of the continuance in his brief in violation of the procedural requirements established in *Linker-Flores*. This omission constitutes grounds for this court to send the case back for rebriefing, and we in no way advocate counsel disregarding the requirements to make a thorough and professional evaluation of the record and discuss all matters in the record that might arguably support an appeal, including any adverse rulings, and to include a statement as to why counsel considers each point raised as incapable of supporting a meritorious appeal. That said, based on our thorough review of the record as it relates to this particular omission and our determination that it does not present a meritorious issue for appeal, as well as our belief that termination appeals are to be expedited when possible, we grant counsel's motion to withdraw and affirm the circuit court's decision terminating appellant's parental rights.

Affirmed.

ROBBINS and BAKER, JJ., agree.